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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1029

FRED B. BLACK, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 6a), is reported at 353 F. 2d 885. An opinion of the District Court for the Western District of Missouri on an issue not presented for review is reported at 216 F. Supp. 645. An unreported memorandum opinion of the district court granting a limited continuance is reprinted in Petitioner's Appendix, 1a–3a.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1965 (Pet. App. 6a). A petition for rehearing was denied on January 17, 1966. The petition for certiorari was filed on February 16, 1966.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion in denying motions for continuance, change of venue, and mistrial based on allegedly prejudicial publicity.

2. Whether there was evidence from which the jury could find that petitioner had the specific criminal intent to evade liability for federal taxes.

STATEMENT

Petitioner was indicted in the Western District of Missouri on March 29, 1963. The indictment charged him in four counts with wilful attempts to evade his income taxes for the years 1956, 1957, 1958 and 1959 in violation of Section 7201 of the Internal Revenue Code of 1954 (R. iv, 1–3).[1] On petitioner's motion, under 18 U.S.C. 3237(b), the case was transferred to the District Court for the District of Columbia on July 2, 1963 (R. v, vi). In October 1963 the case was set for trial on February 17, 1964. The trial date was subsequently continued to April 15, 1964, but Chief Judge McGuire denied petitioner's motion for a further continuance until after the national elections

[1] The last three counts were subsequently superseded by a second indictment filed on April 19, 1963 (R. iv, 3–5). The two indictments were consolidated for trial, and the 1959 count was dismissed on the government's motion at the start of the trial (R. x).

Record references herein are to the Joint Appendix in the Court of Appeals (R.), the reporter's transcript of testimony (Tr.), and government exhibits (Govt. Ex.), all of which are part of the record filed in this Court.

in November, 1964 (Pet. App. 1a–3a). The motion urged that the publicity, involving petitioner, attendant on the investigation into the affairs of Robert G. Baker by a committee of the United States Senate prejudiced his right to an impartial jury (R. 23–34). Chief Judge McGuire held that the publicity had not made a fair trial impossible and that the impartiality of each potential juror could be evaluated on *voir dire* (Pet App. 2a).

Following a trial which lasted from April 15, 1964, to May 5, 1964, the jury returned a verdict of guilty on three counts (R. x–xii, 152–153). The district court imposed a sentence of fifteen months to four years' imprisonment and a fine of $10,000 on each count, the sentences to run concurrently (R. 156–157).

The government's proof established that, for the years 1956, 1957 and 1958, petitioner received $140,087.04 over and above the income reported in his returns. The unpaid tax liability on this unreported income amounted to $91,395.00 (R. 198–199, 206–207, 217–218; Tr. 1990–2004). Petitioner admitted the receipt of practically all the sums involved. His defense was (1) that they represented reimbursement for expenditures on behalf of his clients and (2) that, if the receipts constituted taxable income, he lacked the requisite criminal intent since he relied on agents to prepare his returns.

Petitioner described his business as "public relations work" (Tr. 2290, 2292). The unreported income was received from five clients, who employed him for such varied purposes as determining the cause of delay in a

registration proceeding with the Securities and Exchange Commission (Tr. 208), getting leads to classified construction job opportunities for construction firms with prime contractors (Tr. 559, 600), effecting the transfer of a manufacturing company's renegotiation case from the Justice Department to the Air Force (Tr. 673), trying to get a titanium development contract with the Navy (Tr. 726), and acting as consultant to an aero-space firm on future government policy and on the general problems encountered in doing business with prime government contractors (Tr. 832, 838).

None of these clients knew how the unreported payments were spent, and petitioner rendered no accounting to them (Tr. 229, 429, 601, 681, 850). One client, at the request of petitioner's attorney, abandoned a requirement of itemized expense accounting (Tr. 558–559, 433). The clients regarded the payments, variously, as for petitioner's expenses (Tr. 721), reimbursement of expenses (Tr. 220, 558), or his "operating cost" (Tr. 851). Petitioner's testimony (Tr. 2290–2421) did not disclose any particular use of these funds. Checks from clients totalling $46,000 were cashed or negotiated at various banks and hotels and were not reported on petitioner's returns.[2] Checks from clients totalling $7,054.60,[3] were issued directly to hotels at petitioner's instruction

[2] Govt. Exhibits 7A, 7B, 16G, 16H, 16I, 16L, 16–O, 17b, 17d, 17e, 17f, 17h, 17i, 17j, 17–L, 19B, 20A, 20B, 20N, 20S, 20X, 21A, 21E, 21G, 21–I, 21J 21K, 32d–1, 32g–1.

[3] Govt. Exhibits 23A, 23B, 23C, 23D, 23E, 23F, 23G, 23H, 23I, 23J, 23K, 23L, 23M, 15B.

(Tr. 698–699, 748) to pay bills which correspond to specific deductions claimed in petitioner's tax returns (Govt. Exs. 43, 45; R. 296–309; Tr. 404, 938–959, 1342). The hotel bills were supplied to petitioner's accountant for deduction purposes (Tr. 928), but petitioner did not tell his accountant that the bills had been paid directly by clients (Tr. 1340). In general, it was shown that petitioner reported those receipts of which the government had notice because clients had reported payments (on Form W–2 or Form 1099), but that he failed to report receipts where there was no reason to believe that the government had been notified of the payments.

Petitioner's returns were prepared by a certified public accountant (James C. Muskrat) in Joplin, Missouri, where petitioner maintained space in the office of his attorney (Ralph Baird). Petitioner participated in conferences with Muskrat and Baird (Tr. 987, 999, 1001, 1017, 1045, 1046, 1047, 1052, 1060, 1105, 1204, 1319, 1323) concerning the preparation of the returns. None of the 1956 omitted income was mentioned to Muskrat (Tr. 1014), and for 1957 and 1958 income Muskrat relied on Forms W–2 and 1099 (Tr. 1030, 1052–1053, 1097, 1133).

Petitioner, in statements to investigating agents and in testifying, stated he did not know why the omitted receipts were not reported (Tr. 1867–1868, 2377, 2390, 2395–2396), and that he relied on Muskrat and Baird to accumulate income information and prepare returns properly (Tr. 2308).

ARGUMENT

1. There is no merit to the contentions (Pet. 14–23) that petitioner was prejudiced by publicity, both before and during the trial.

There was no discussion of petitioner's tax affairs in the pre-trial press accounts beyond factual references to the pending indictment (R. 49, 57, 61, 70, 76). The examination of the panel of prospective jurors by defense counsel showed that none of them had ever heard of petitioner (Tr. 3, 14). Defense counsel exercised no challenge for cause. Substantial discretion is entrusted to the trial judge in assessing and averting the danger of prejudice from publicity and in ruling on mistrial or continuance motions. *Marshall* v. *United States*, 360 U.S. 310, 312. Three district court judges independently assessed pretrial publicity as lacking inherently prejudicial involvement of petitioner in the "Bobby Baker" investigation (Transcripts of motion hearings on February 6, 1964 (p. 8), April 1, 1964 (p. 33), April 10, 1964 (p. 25)).

It is undeniable that the news media carried reports on the trial while it was in progress. The trial judge repeatedly admonished the jury to avoid all discussion of the case in the news (Tr. 30, 33, 160, 313–314, 458, 646–647, 856, 1072, 1239), and petitioner agreed that it would be imprudent to overdo the warnings (Tr. 77). Petitioner failed to show that any of the stories came to the attention of the jury. Petitioner never requested the sequestration of the jury; and when the trial judge, in response to petitioner's complaints about publicity, decided *sua sponte* to sequester the jury, petitioner objected (Tr. 1242–1250).

Petitioner makes no showing of jury exposure, a usual requirement to support contentions of prejudicial publicity. *Estes* v. *United States,* 335 F. 2d 609, 613 (C.A. 5), certiorari denied, 379 U.S. 964; *United States v. Griffin,* 176 F. 2d 727, 731 (C.A. 3), certiorari denied, 338 U.S. 952; *Smith* v. *United States,* 236 F. 2d 260, 269–270 (C.A. 8), certiorari denied, 352 U.S. 909. Unlike *Marshall* v. *United States,* 360 U.S. 310, there is here no background of press articles flaunting inadmissible evidence before a jury. See also *Janko* v. *United States,* 281 F. 2d 156 (C.A. 8), affirmed, 366 U.S. 716. Nor is there any failure of adequate admonitory instructions, as in *United States* v. *Accardo,* 298 F. 2d 133, 136 (C.A. 7); *Coppedge* v. *United States,* 272 F. 2d 504, 507–508 (C.A. D.C.), certiorari denied, 368 U.S. 855. This is not the case where "a procedure employed by the state involves such a probability that prejudice will result that it is deemed inherently lacking in due process", as in *Estes* v. *Texas,* 381 U.S. 532, 542–543. Refusal to poll a jury, thereby generating new tendencies of a prejudicial nature, and reliance on the jury's integrity in observing admonitory instructions, are not error even in the face of more clearly prejudicial publicity than was present in this case. *Estes* v. *United States,* 335 F. 2d 609, 614–615 (C.A. 5), certiorari denied, 379 U.S. 964; *Ford* v. *United States,* 233 F. 2d 56, 61 (C.A. 5), certiorari denied, 352 U.S. 833.

The court of appeals pointed out that petitioner had been charged with tax fraud in Missouri "long before his activities in Washington began to be revealed there" (Pet. App. 11a), and that the case had been

transferred from the Western District of Missouri to the District of Columbia on petitioner's own motion (Pet. App. 8a). The court nevertheless carefully considered each of petitioner's various claims that he was denied a fair trial and rejected them. The denial of petitioner's motion to transfer the case back to Missouri as well as the denial of a nine-month continuance the court found to be "well within the range of discretion committed to the trial court in the dispatch of its business"; it could find "no indication that this discretion was abused in any way" (Pet. App. 9a). The court likewise found no error in the denial of petitioner's several motions for a mistrial nor in any of the trial judge's evidentiary rulings (Pet. App. 9a–11a). None of these matters which are pressed in the petition warrant further review by this Court.

2. Petitioner urges that the government failed to prove the requisite specific intent to evade tax liability and that such intent was negatived by evidence of his reliance on his attorney and accountant to prepare his tax returns.[4] These were matters for the jury to determine and the jury was carefully and properly instructed on the necessary elements of the government's case. The trial judge charged the jury that

[4] Receipt of the unreported payments was admitted in a memorandum brief (Govt. Ex. 13; R. 260) filed with the Internal Revenue Service by petitioner's attorney, who acted under formal power of attorney (Tr. 370–371). Petitioner's contention (Pet. 34, 36) that the brief was improperly admitted in evidence is without merit. *Banks* v. *United States*, 204 F. 2d 666, 670 (C.A. 8), certiorari denied, 346 U.S. 857; *Himmelfarb* v. *United States*, 175 F. 2d 924 (C.A. 9), certiorari denied, 338 U.S. 860.

there were three ultimate questions to be determined (R. 329):

> First, was there a greater tax due from the defendant for the tax year in question than was shown on the defendant's tax return for that year?
>
> Second, did the defendant know that there was a greater tax due than was shown on the income tax return in question?
>
> And, third, did the defendant wilfully attempt to evade the tax known by him to be due by filing or causing to be filed a false income tax return which understated the tax due for the year covered by the return?
>
> These are the three ultimate questions to be considered by you as to each of the three years in issue. All three elements must exist, that is, you must be able to answer each of these questions in the affirmative before you may return a verdict of guilty as to any one or all of the counts. Each of these elements is indispensable to the existence of the charge in each count of the indictments, and each must be proved by the Government beyond a reasonable doubt, and the absence of any one of these elements would require you to return a verdict of not guilty on that specific charge.

The trial judge also stressed (R. 330) that "[s]pecific intent to evade income tax liability is not to be presumed or inferred merely from the filing of an incorrect or understated tax return" and that (R. 331):

> If the Government has proved to you by the evidence, beyond a reasonable doubt, that the defendant's tax returns for either of the years 1956, 1957 and 1958 did not fully and correctly

> report defendant's income and the tax due thereon in such year or years, this fact standing alone will not warrant a conviction. Conviction of the defendant on the counts charged will only be warranted if you further find that the Government has proved beyond a reasonable doubt that the returns were filed in a wilful and an intentional attempt to evade and defeat the income tax. The wilful attempt to evade and defeat the payment of income tax is an essential element as to each year in question which must be proved by the Government beyond a reasonable doubt, just as any other fact in the case.

And, finally, the jury was instructed that the petitioner could not be found guilty unless he "had actual knowledge of the existence of an obligation to pay a greater tax and * * * wilfully attempted to evade or defeat such tax" (R. 333).

In light of these instructions, the jury's verdict is dispositive of petitioner's contentions unless there was no evidence to support the verdict. But the verdict was amply supported. It was proved that petitioner's receipts considerably exceeded those he reported.[5] The jury was entitled to believe that the

[5] Petitioner contends (Pet. 35-36) that Baird and Muskrat were coerced into testifying for the government by threats of prosecution. Contrary to the petitioner's assertion (Pet. 35), the court of appeals did not find as a fact that their cooperation was coerced, although the dissenting opinion (to which the petition refers) does say that cooperation was "possibly coerced" (Pet. App. 25a). Muskrat was never examined on this question and there is simply nothing in the record to suggest that he was threatened in any way.

The suggestion that Baird was coerced is based on the following admittedly ambiguous question put to Baird by an in-

deductions and exclusions which petitioner claimed on his returns were all that he properly could claim. See *United States* v. *Bender,* 218 F. 2d 869 (C.A. 7), certiorari denied, 349 U.S. 920; see also *Clark* v. *United States,* 211 F. 2d 100 (C.A. 8); *United States* v. *Link,* 202 F. 2d 592 (C.A. 3); *United States* v. *Zimmerman,* 108 F. 2d 370 (C.A. 7). There was testimony (Tr. 699, 748, 404, 938–959, 1340) that petitioner sent hotel bills to his accountant for purposes of claiming deductions although he knew that the bills had been paid directly by his clients and that he was, therefore, taking deductions for expenses he had not incurred. This testimony alone not only warrants a finding of intent to evade tax liability, but also disproves petitioner's claimed reliance on his accountant and attorney.

On the basis of its review of the record, the court of appeals concluded (Pet. App. 16a) that there was evidence to support a finding "that appellant wilfully

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vestigating agent in a recorded interview on February 8, 1962 (Tr. 1956): "Q. What defense have you got if this matter goes to tax court or to criminal court?" Although the question would seem to refer to the potential criminal liability of Baird's client rather than of Baird himself, Baird testified (Tr. 1758) that he considered the question to be a threat of criminal prosecution. This was unquestionably a matter for the jury to consider in determining Baird's credibility as a witness for the prosecution. Defense counsel disclaimed any suggestion that the prosecuting attorneys were a party to the alleged coercion of Baird (Tr. 1610), but rested the claim on the language used by the investigating agent more than 2 years before the trial (Tr. 2127). The trial judge found Baird to be a "reluctant" government witness (Tr. 1609) but denied the government's request to examine him as a hostile witness (Tr. 1364–1366).

followed a course of evading his income tax liabilities by arranging to receive large sums of money for which he did not account in any way." Further, the court found (Pet. App. 21a–24a) sufficient evidence to warrant rejection of petitioner's claim of reliance upon his accountant and attorney. While the dissenting judge thought that the record supported petitioner's claim of reliance (Pet. App. 25a–26a), the narrow evidentiary issue tendered by the petition does not call for resolution by this Court.

CONCLUSION

For the reasons stated, the writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1966.

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